

SERVED: June 21, 1996

NTSB Order No. EA-4465

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of June, 1996

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14450
v.)	
)	
EXCALIBUR AVIATION, INC.)	
)	
Respondent.)	
)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered in this proceeding at the conclusion of a five-day evidentiary hearing held on May 8-10 and 14-15, 1996.¹ By that decision, the law judge affirmed the revocation of respondent's air carrier operating certificate, finding that, over the course of several

¹ An excerpt from the hearing transcript containing the initial decision is attached.

months, Excalibur Aviation, Inc. (Excalibur) operated contrary to its operations specifications and violated sections 47.3(b)(1) and (2), 91.203(a)(2), 135.5, 135.63(c), 135.95(b), 135.243(c)(2), 135.293(a) and (b), 135.297(a), and 135.299(a) of the Federal Aviation Regulations (FAR), 49 C.F.R. Parts 47, 91, and 135.² As discussed below, we deny respondent's appeal and affirm the initial decision.³

We turn first to a procedural matter regarding a motion by the Administrator to dismiss for failure to timely perfect the appeal. As this is an emergency proceeding, respondent was required to file an appeal brief, via overnight mail or facsimile (fax), within five days after filing the notice of appeal. NTSB Rules of Practice, 49 C.F.R. § 821.57(b). Since respondent's notice of appeal was filed on May 17, 1996, the appeal brief, to be timely, had to be filed with the Board and served on the Administrator by May 22, 1996. Although respondent's attorney

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² See Appendix for a copy of the order of revocation (complaint) and the text of pertinent regulations. The law judge also found that the Administrator had not proven by a preponderance of the evidence a violation of FAR sections 91.13(a) and 91.207(2). The Administrator did not appeal this finding.

³ The Administrator issued separate revocation orders to Excalibur and to Lee H. Allen, the Vice President and General Manager of Excalibur and the sole pilot authorized in its operations specifications to conduct Part 135 airplane operations. The cases were consolidated for hearing and, in his oral initial decision, the law judge reduced Mr. Allen's sanction to a 180-day suspension. Although Mr. Allen originally appealed the decision to the NTSB, he withdrew his appeal on March 22, 1996. The Administrator did not appeal the reduction in sanction.

filed a withdrawal of Respondent Lee H. Allen's notice of appeal by fax on May 22, he did not file Respondent Excalibur's appeal brief by fax. Instead, a copy of the brief was delivered to the Board and to FAA counsel of record on Friday, May 24, 1996, via Federal Express. Included with the brief was a certificate of service signed by respondent's attorney, dated May 22, 1996, and certifying filing on that date. Yet, curiously, although the date on the address label typed by the sender reads "5/22/96," the Federal Express tracking sticker on each package reads, "STANDARD OVERNIGHT FRI," and "Deliver By: 24 MAY 96," and the log-in time and date on the sticker was "23 MAY 96 20:38." ⁴ See attachment to Administrator's amended motion to dismiss. Nevertheless, respondent's attorney maintains that he delivered copies of the appeal brief to Federal Express on May 22, 1996. See Affidavit of Joseph D. Kuchta, respondent's reply to motion to dismiss.

While it would seem that respondent's attorney is mistaken about the date on which he tendered the briefs, our rules can be read to require deference to the date on the certificate of service and do not specifically state that the tracking label on an overnight delivery package may be treated as either the equivalent of a postmark or the best evidence of the date on which a brief was filed.⁵ In addition, in cases involving

⁴ The "22" was lined out on the package sent to the FAA and the number "23" was written in on both packages.

⁵ The pertinent portion of rule 821.7(a), regarding filing documents with the Board, states:

Unless otherwise shown to be inaccurate, documents

service by regular mail, we have accepted as timely a brief with a certificate of service dated on the due date, even though the postmark reflected a later date. See Administrator v. Heimerl and Forrest, NTSB Order No. EA-4134 at 2, n. 1 (1994); Administrator v. Rivers, NTSB Order No. EA-3753 at 2, n. 2 (1992). As a consequence, we will deny the Administrator's motion. We note, however, that, in future cases, where a disparity exists between the date on the certificate of service and the log-in date and time on an overnight delivery tracking label, the certificate of service will not automatically be given preference as proof of the date of filing.⁶

As for the merits of the case, the order of revocation, which is separated into six counts, centered around allegations that, although Excalibur's operating specifications authorized it to conduct Part 135 operations only in VFR⁷ conditions, Excalibur

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shall be deemed filed on the date of personal delivery, on the send date shown on the facsimile (provided a confirmation copy is properly served), and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark.

49 C.F.R. § 821.7(a).

⁶ Furthermore, if this had not been an emergency case under very strict time constraints, we would have required respondent to provide such evidence as would be necessary to resolve the disparity between the date respondent's counsel says he delivered (or served) the briefs and the date Federal Express's documentation indicates they were received.

⁷ Visual flight rules.

passenger and/or cargo-carrying flights were operated under IFR⁸ conditions; some of the pilots of those flights did not have the requisite competency checks or total hours of flight time; and Excalibur utilized pilots and aircraft that were not listed in its operations specifications. Respondent has admitted that the operations specifications issued to Excalibur authorize Part 135 operations conducted under VFR only, that Lee H. Allen is the only pilot authorized to conduct Part 135 operations for the carrier and, only one of two aircraft may be utilized in these operations.⁹

To the extent that respondent, on appeal, challenges the law judge's credibility determinations, we find that respondent has not shown the decisions to be arbitrary, capricious, or otherwise inconsistent with law. Barring such a showing, the Board will not overturn the law judge's credibility findings. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987). We have examined the record and found no reason to second-guess the demeanor findings of the law judge, who was in the best position to assess the credibility of the witnesses as they testified. He thoroughly discussed the evidence in the initial decision and supported his conclusions in adequate detail. Clearly, the "process of choosing between conflicting testimony" is subjective. Administrator v. Walker, 3 NTSB 1298, 1299 (1978). That a

⁸ Instrument flight rules.

⁹ Respondent admitted to the charges in paragraphs 2, 3, and 4 of the complaint. See Appendix. The aircraft are a Piper PA-23 Aztec, N606CA, and a Piper PA31-350, Navajo, N221MJ.

respondent wishes the law judge to espouse his version of the facts, or believes his explanation of the facts is more probable than that of the Administrator, is insufficient to merit a reversal of a law judge's credibility evaluation. See Administrator v. Leader, NTSB Order No. EA-3518 at 5 (1992); Administrator v. Klock, NTSB Order No. EA-3045 (1989).

In light of the compressed time schedule under which we must issue this opinion and order, we will limit our discussion of the facts in the counts where respondent's appeal challenges only the law judge's credibility findings.

COUNT I

This count involves the operation, on September 28, 1995, of the Piper Aztec, N606CA, from Bismark to Fargo. The Administrator alleged that the aircraft was operated in Part 135 passenger-carrying service for Excalibur by pilot Joseph Gerritson but that Mr. Gerritson was not qualified to act as pilot-in-command of a Part 135 flight. Respondent maintains that the flight was undertaken for the purpose of instruction and transportation and, therefore, was not conducted under Part 135.

Respondent's challenge rests primarily on credibility issues and, as such, we will not, as stated above, discuss the specific evidence offered by each party. The law judge unequivocally based on credibility his determination that the flight was undertaken for the purpose of providing air transportation for a doctor and his staff, who were scheduled to perform surgery that day, and did not believe that the flight was undertaken to

provide flight instruction. (Tr. at 1005.) This decision was well-supported in the record. Therefore, the conclusion that the flight was conducted by a Part 135 operator for the purpose of transporting passengers was a reasonable one, supported by preponderant evidence.¹⁰

COUNT II

Respondent argues that the law judge erred in deciding that Mr. Allen operated a Part 135 flight for Excalibur on November 29, 1995, under IFR conditions. Respondent continues that, despite the limitation in its operations specifications authorizing Part 135 operations only under VFR, they allowed "portions of the departure and arrival [to be] conducted under IFR and in IMC [Instrument Meteorological Conditions]." Respondent's appeal brief at 6-7. As explained below, we disagree.

First, substantial evidence supports the law judge's finding that Mr. Allen conducted the flight under IFR conditions and that Excalibur was authorized to operate Part 135 operations under VFR

¹⁰ Respondent asserts, in the appeal of Counts I and IV (erroneously referenced in his brief as Count VI), that a letter written by the Associate Administrator for Regulation and Certification constitutes a validly-adopted interpretation of the FARs. (Ex. R-17.) It suggests that while the letter indicates that the provision by an aviation company of both the aircraft and pilot is "'merely one factor to be considered'" when determining whether a flight was operated under Part 91 or Part 135 of the FARs, the law judge gave dispositive weight to this factor alone. We disagree. The law judge clearly based his decision on many other factors in addition to the conclusion that Excalibur had furnished both the airplane and the pilot for the flight. See, e.g., Initial Decision at 997-1000, 1004-05, 1010-11.

only.¹¹ Mr. Allen filed a flight plan on November 29, 1995, for N221MJ, Bismark to Williston and return; the weather forecast called for IFR conditions; and the information contained on the flight progress strips indicated that the flight was conducted IFR.¹² (Tr. at 448-49, 452, 900; Ex. A-32, A-33.) The pertinent Bismark Air Traffic Control tape further evidenced that N221MJ was issued an IFR clearance and operated under IFR. (Tr. at 457, 461; Ex. A-35, R-15.) The tape from Salt Lake City Air Route Traffic Control Center indicated that N221MJ was cleared for an ILS approach to Williston. (Tr. at 462; Ex. R-29.) That Mr. Allen's testimony contradicted the testimony of the Administrator's witnesses required the law judge to resolve the conflict through a credibility assessment.¹³

¹¹ FAA Aviation Safety Inspector Robert Harris testified that Excalibur was limited, by the terms of its operations specifications, to VFR-only operation, which meant that it was authorized to operate in VFR conditions only. When asked if this meant that Excalibur must avoid instrument flight conditions and operate only in visual flight conditions, he replied, yes. He further explained that they could fly practice approaches, but only in VFR conditions. (Tr. at 421-22, 427.)

¹² The reported weather from the National Weather Service for Bismark at 8:50 a.m. and 9:50 a.m. local time was measured 500 feet overcast, visibility at seven miles. (Tr. at 455, 902; Ex. A-34.) N221MJ departed Bismark at 15:34 UTC, 9:34 a.m. local time.

The departure flight strip indicated that, after Mr. Allen received clearance for 6,000 feet, he asked for and received clearance to fly VFR on top at 6,500 feet. As testified to by the Bismark ATC Manager, the aircraft, at that point, was still on an IFR clearance. (Tr. at 907-08.)

¹³ Mr. Allen averred that he checked the weather before the flight through the NOTAM-approved Pan Am weather system and filed a flight plan. (Tr. at 777.) To the best of his recollection, the weather forecast for Bismark was "2,000 - some scattered,

Respondent's contention that, under the FARs, it is permissible for an aircraft to pass through IMC in order to reach VFR over-the-top, whether or not that is true, is beside the point in this case.¹⁴ By its operations specifications, Excalibur was authorized to conduct VFR operations only.¹⁵ That limitation is breached, the evidence establishes, by operating through IFR conditions in order to reach an altitude where VFR conditions prevail. If its operations specifications were meant

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3,000 ceiling, ten miles visibility," and for arrival at Williston was 7,000 scattered, 5 or 8 miles visibility. (Tr. at 778.) He maintained that, when he departed Bismark, the weather was 2,000 scattered, higher layer above that at 3,000, and 10-mile visibility and that, during this flight, he never operated the aircraft in IMC. (Tr. at 779-80.)

¹⁴ Mr. Allen claimed that section 135.181 of the FARs permitted him to file an IFR flight plan for this flight and depart IFR as long as he could reach VFR conditions within 15 minutes. (Tr. at 792-93.)

¹⁵ The supervisor of the Fargo FSDO Operations Program testified that operations specifications delineate what an operator is authorized to do and, in this case, Excalibur could operate VFR over the top only if the aircraft did not have to go through IFR to get there. (Tr. at 703, 711, 713-14.) When asked if VFR on top is considered VFR, he testified:

A: ...It can be yes, it can be no, and that's based on how you got there and that would be if you needed an instrument clearance to get VFR on top, that's an instrument clearance. If you're VFR over a particular cloud layer, that's permissible, yes.

Q: So is it your testimony that if you are operating under a VFR only limitation, that you cannot fly by the VFR over the top rules?

A: No, sir. That was not my testimony. My testimony was that you could fly under visual flight rules, but you could not take an instrument clearance to get to the visual flight rules...

to authorize IFR takeoffs or landings, they, presumably, would say so and define the limits of those operations.

COUNT III

The Administrator alleged that, on numerous occasions, Excalibur used a Cessna 182, N3141R, in its Part 135 operation when Excalibur's operations specifications did not authorize the use of that aircraft. Respondent concedes that it rented the Cessna 182 from Mr. Tony Walth, that Mr. Allen was the only pilot authorized by its operations specifications to be used as a pilot for its Part 135 flights, and that the Cessna was not listed on the operations specifications. Respondent nevertheless argues that the charges should not be sustained because the law judge erred in his interpretation of the facts and the "FAA conspired to create evidence of an illegal charter flight." Respondent's Appeal Brief at 14. We find these arguments unpersuasive.

The law judge found that Excalibur supplied a charter flight to employees of Melroe Company and the Legal Assistance Clinic of North Dakota (LAND), that Mr. Walth was the pilot-in-command of these flights, and that they were conducted in the Cessna 182. He further found that, while an attorney from LAND received flight instruction during portions of some of the flights, the purpose of the flights was transportation, not instruction. Ample evidence in the record supports his decision.

As for respondent's contention that the FAA conspired to "create evidence," we find the argument entirely baseless.

Respondent attempts to support its claim with, at best, speculation and controvertible evidence. For example, respondent argues that the manager at the Fargo Flight Standards District Office (FSDO) advised a LAND employee in such a way that the manager "manufactur[ed] evidence of a violation." Respondent's brief at 15. The facts, however, do not support this accusation. Specifically, it was established that Mr. Walth attempted to collect his pilot fee from LAND, for flights that had occurred weeks before, asking that his fee be paid separately from the payment sent to Excalibur.¹⁶ He brought a bill for his services to LAND, written on an Excalibur form, but with his name on a sticker placed over the letterhead. (Tr. at 229.) When the LAND accountant, Vicki Hagstrom, questioned him, Mr. Walth told her that Excalibur was having a problem with the FAA and it would be easier for him to be paid directly. (Tr. at 230.) Before paying the bill, Ms. Hagstrom called the Fargo FSDO for advice, where it was suggested that she pay the party with whom she had dealt in seeking the transportation. (Tr. at 231.)

The manager of the Fargo FSDO testified that, before answering, she asked Ms. Hagstrom if LAND intended to rent the aircraft. Ms. Hagstrom replied that LAND was just trying to get transportation for an employee. (Tr. at 726.) She then advised

¹⁶ Mr. Walth stated that, between July 1995 and January 1996, he flew his aircraft for Excalibur and Excalibur did the billing. (Tr. at 258.) Mr. Allen testified that he told Mr. Walth to collect his fee for pilot services directly from LAND, but not to submit a bill for the aircraft rental to them. (Tr. at 765.) He also said that he did not authorize Mr. Walth's use of the Excalibur billing form. (Tr. at 767.)

Ms. Hagstrom that, as a manager, she would pay the person or entity from whom she had obtained the service.¹⁷ Thereafter, LAND paid Excalibur directly for the flights and, ultimately, received the canceled checks back.

Respondent also challenges the finding of a violation of FAR sections 47.3(b)(1) and (2) and 91.203(a)(2), arguing that an exception to the registration requirement applied, in that Mr. Walth carried the second (pink) copy of the registration application on board the aircraft. The facts, however, belie this claim. Mr. Walth, the undisputed owner of the aircraft, testified that, although he registered the aircraft with the state, he did not register with the FAA until January 1996. (Tr. at 256.) The signed, second copy of an aircraft registration carried in an aircraft can serve as the registration under

¹⁷ The following exchange between counsel for respondent and the FSDO manager occurred:

- Q. Did you give her any advice regarding paying the pilot?
- A. I told her that we did not deal in accounting and that basically if it was me as a manager, that it was not from the Federal Aviation Administration, that I would issue a check for payment to whoever I had obtained services from.
- Q. So you advised her to pay Excalibur for pilot services and aircraft rental?
- A. No. No. I did not - I did not advise her to pay Excalibur.... I said, well, I can't advise you because I'm not an accountant, and I said but as a manager, I - in my office, I would pay whoever I had obtained services from and let them deal with the specifics.

(Tr. at 727.)

limited circumstances, as described in the cited FAR sections. Those exceptions, however, are only valid after an applicant has submitted his Aircraft Registration Application to the FAA. 14 C.F.R. § 47.31(a). Since Mr. Walth did not register his aircraft with the FAA, the second (pink) copy exceptions do not apply.

COUNT IV

Respondent challenges the law judge's determination that a passenger-carrying flight operated by Excalibur on January 16, 1996, was a charter, not a rental. The pilot-in-command was Joseph Gerritson. Again, to the extent that respondent challenges the law judge's credibility assessment, we find that sufficient evidence supports his findings.

Respondent also contends that Mr. Allen relied to his detriment on misleading advice given to him by counsel for the Administrator.¹⁸ There is insufficient evidence to show that the advice was given or that respondent violated the FARs based on Mr. Allen's reliance on the advice. However, even assuming that the advice was tendered, it is unreasonable to interpret the advice as saying that, simply by issuing separate bills for aircraft and pilot services, a Part 135 flight would be transformed into a Part 91 flight. As such, we reject this argument.

¹⁸ Mr. Allen claimed that he sought advice from counsel for the Administrator on the distinction between charters and rentals. Respondent asserts that counsel compared a charter to hiring a limousine, where the driver was included in the price, and an aircraft rental to a car rental, where the renter procures his own driver.

COUNT V

The Administrator alleged, and respondent admitted, that on January 3, 1996, Mr. Allen failed a written examination required under FAR sections 135.293 and 135.299 for Part 135 operations. It is further undisputed that Mr. Allen operated the Piper Navajo, N221MJ, for Excalibur, transporting staff members from the Heart and Lung Clinic of St. Alexius Hospital roundtrip from Bismark, North Dakota, to Eagle Butte, South Dakota, on January 10, 1996, and that an IFR flight plan was filed in flight. On appeal, respondent argues that the law judge erred in finding that Excalibur operated the flight under Part 135 because it was a demonstration flight, not one for compensation or hire.¹⁹

Again, ample evidence supports the law judge's determination that this was not a demonstration flight. The receptionist for the Heart and Lung Clinic testified that, as a regular part of her duties, she makes travel arrangements for staff to travel, by air, to a satellite office. (Tr. at 131-32.) Because the air charter service that the clinic normally used did not have an airplane available for January 10th, she contacted Excalibur to request air transportation for the staff.²⁰ A dollar amount was quoted to her, including holding time, but there was no mention of a demonstration flight, or a separate cost for a pilot, gas,

¹⁹ Respondent does not appeal the law judge's finding that the flight was conducted under IFR.

²⁰ She did not specifically ask for a charter, but requested, "we needed a plane to go to Eagle Butte on such a day for this time and for this amount of people and what [could they] do for us." (Tr. at 135.)

insurance. (Tr. at 136.) A physician's assistant from the Heart and Lung Clinic also testified that she was among four passengers on the January 10th flight, that she flies about three times a month with another charter carrier, and that this flight was similar to all the other charter flights except that, after they arrived in Eagle Butte on January 10th, the Excalibur aircraft did not stay and wait for them. (Tr. at 146, 151-52.)

COUNT VI

The Administrator alleged that, on January 16, 1996, Mr. Lee Allen acted as pilot-in-command for Excalibur on a Part 135 passenger-carrying flight for compensation or hire when he had not passed the required proficiency checks under sections 135.293 and 135.299. Again, respondent contends that, based on a validly-adopted interpretation of the FARs set forth in a letter written by the FAA's Associate Administrator for Regulation and Certification, this was a rental, not a charter, and that, even if it was a charter, Mr. Allen was misled by advice he sought from counsel for the Administrator.²¹

We have already rejected respondent's argument regarding the Associate Administrator's letter, as discussed in Count I, supra note 10, and the contention that Mr. Allen was misled by incomplete advice from FAA legal counsel. See discussion, supra, Count IV. That Excalibur provided the pilot and the aircraft for this flight is but one factor considered by the law judge in

²¹ Respondent's argument on Count VI appears in the appeal brief under "Count IV."

rendering his decision. Specifically, this was a round-trip flight between Bismark, North Dakota, and Wheatland, Wyoming, to transport employees of Cooperative Power Association (Cooperative Power). An administrative assistant for Cooperative Power testified that, after referring to an advertisement in the local yellow pages for Excalibur, she called and requested a charter flight.²² (Tr. at 54.) In the conversations that she had with personnel at Excalibur, there was no mention of an aircraft rental vs. a charter, a pilot being hired separately, or the flight being a demonstration flight. (Tr. at 55, 70.) Two days after the flight, Mr. Allen went to Cooperative Power and asked the assistant to sign separate bills for aircraft rental and pilot services. (Tr. at 61-62.) She stated that she signed the bills, but did not understand the difference between a charter and a rental. (Tr. at 81.) Cooperative Power's plant manager also testified that they expected to receive a charter flight and that he was not even aware that there were other options until after a January 23, 1996 meeting with Mr. Allen. (Tr. at 107.)

The customer service representative for Excalibur testified that she told Cooperative Power that there was no charter pilot available, but Excalibur had an aircraft to rent and could provide her with a list of pilots. (Tr. at 633.)

The law judge found that Mr. Allen operated N221MJ for

²² The ad read, "CHARTERS" and "24 Hour[,] Passenger & Cargo Service[,] Professional Pilots[,] Flight Instruction." (Ex. A-2.) While also mentioning maintenance service, the ad did not mention aircraft rental.

Excalibur on January 16, 1996, as alleged in the complaint, that he did not have the required proficiency checks, and that, a preponderance of the evidence supports that the flight was operated under Part 135. (Tr. at 989, 1014.) This is clearly a credibility decision which, unless arbitrary, capricious, or otherwise not in accordance with law, we will not disturb.

In sum, respondent has presented no bases to overturn the law judge's initial decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

§47.3 Registration required.

* * * *

(b) No person may operate on aircraft that is eligible for registration under section 501 of the Federal Aviation Act of 1958 unless the aircraft.—

- (1) Has been registered by its owner;
- (2) Is carrying aboard the temporary authorization required by §47.31(b)

§91.203 Civil aircraft: Certifications required.

(a) Except as provided in §91.715, no person may operate a civil aircraft unless it has within it the following

* * * *

(2) An effective U.S. registration certificate issued to its owner or, for operation within the United States, the second duplicate copy (pink) of the Aircraft Registration Application as provided for in §47.31(b), or a registration certificate issued under the laws of a foreign country.

§ 135.5 Certificate and operations specifications required. -

No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part, or, for operations with large aircraft having a maximum passenger seating configuration, excluding any pilot seat, of more than 30 seats, or a maximum payload capacity of more than 7,500 pounds, without, or in violation of, appropriate operations

specifications issued under part 121 of this chapter.

§ 135.63 Recordkeeping requirements.

* * * *

(c) For multiengine aircraft, each certificate holder is responsible for the preparation and accuracy of a load manifest in duplicate containing information concerning the loading of the aircraft. The manifest must be prepared before each takeoff and must include:

- (1) The number of passengers;
- (2) The total weight of the loaded aircraft;
- (3) The maximum allowable takeoff weight for that flight;
- (4) The center of gravity limits;
- (5) The center of gravity of the loaded aircraft except that the actual center of gravity need not be computed if the aircraft is loaded according to a loading schedule or other approved method that ensures that the center of gravity of the loaded aircraft is within

approved limits. In those cases, an entry shall be made on the manifest indicating that the center of gravity is within limits according to a loading schedule or other approved method;

- (6) The registration number of the aircraft or flight number;
- (7) The origin and destination; and
- (8) Identification of crew members and their crew position assignments.

§135.95 Airmen: Limitations on use of services.

No certificate holder may use the services of any person as an airman unless the person performing those services—

- (a) Holds an appropriate and current airman certificate; and
- (b) Is qualified, under this chapter, for the operation for which the person is to be used.

§ 135.243 Pilot in command qualifications.

* * * *

(c) Except as provided in paragraph (a) of this section, no certificate holder may use a person, nor may any person serve as pilot in command of an aircraft under IFR unless that person—

- (1) Holds at least a commercial pilot certificate with appropriate category and class ratings and, if required, an appropriate type rating for that aircraft; and
- (2) Has had at least 1,200 hours of flight time as a pilot, including 500 hours of cross country flight time, 100 hours of night flight time, and 75 hours of actual or simulated instrument time at least 50 hours of which were in actual flight;

6135.293 Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas—

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft

Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance

of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model).

§ 135.297 Pilot in command: Instrument proficiency check requirements.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

§ 135.299 Pilot in command: Line checks: Routes and airports.

(a) No certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly. The flight check shall —

(1) Be given by an approved check pilot or by the Administrator;

(2) Consist of at least one flight over one route segment; and

(3) Include takeoffs and landings at one or more representative airports. In addition to the requirements of this paragraph, for a pilot authorized to conduct IFR operations, at least one flight shall be flown over a civil airway, an approved off-airway route, or a portion of either of them.

APR 02 1996

In Reply

Refer to: AGL-7F
95-GL-21-0041
96-GL-21-0009
96-GL-21-0014
96-GL-21-0016
96-GL-21-0018
96-GL-21-0019
96-GL-21-0021

OVERNIGHT/CERTIFIED/REGULAR

Area Code 847 294-7109

TO: Lee H. Allen, General Manager
Excalibur Aviation, Inc.
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Bismarck, ND 58506

EMERGENCY ORDER OF REVOCATION

It has been determined by the Administrator of the Federal Aviation Administration, acting by and through his Assistant Chief Counsel, that on the basis of all available information, Excalibur Aviation, Inc. violated the Federal Aviation Regulations hereinafter enumerated in the following respects:

1. Excalibur Aviation, Inc., holds Air Carrier Operating Certificate Number, E4XA901W and Operations Specifications appropriate for operations under Part 135 of the Federal Aviation Regulations.
2. At all time material herein, Excalibur Aviation, Inc Operations Specifications paragraph A3 authorizes VFR only type of operations for en route flight rules, Paragraph B3(1) limits the Part 135 operations to VFR only.
3. Excalibur Aviation Inc. Operations Specifications paragraph A16, limit the operator to conduct operations a single pilot operator. The only pilot authorized to be used is Lee H. Allen. Mr. Allen is the Vice President, General Manager and agent for service of Excalibur Aviation, Inc.

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4. Excalibur Aviation, Inc. Operations Specifications paragraph A3 only authorizes the use of PA-23-250 and PA-31-350 aircraft.
5. Excalibur Aviation, Inc. is the registered owner of civil aircraft N606CA, a multiengined Piper PA-23 (Aztec) and N221MJ, a multiengined Piper PA31-350 (Navajo).

COUNT I

6. On September 28, 1995, Excalibur Aviation, Inc. operated N606CA, a Piper PA-23-250, in passenger carrying operations, with four passengers on board, for compensation or hire under Part 135 of the Federal Aviation Regulations, from Bismarck, North Dakota, to Fargo International Airport, Fargo, North Dakota.
7. Joseph B. Gerritson was pilot in command on the above cited flight.
8. On or about August 29, 1995, Mr. Gerritson failed to pass a FAR 135 competency/proficiency check under Part 135.293 and Part 135.299 for Excalibur Aviation in a PA23-250.
9. At the time of the above described flight, Mr. Gerritson had not passed the required tests and checks of Part 135.293(a), (b) and 135.299, within the past 12 months.
10. Excalibur neither prepared nor kept a load manifest for the above described flight.

(95-GL-21-0041)

COUNT II.

11. On November 29, 1995, Excalibur Aviation, Inc. operated N221MJ, a Piper Model 31-350, in freight carrying operations from Bismarck, North Dakota, to Williston, North Dakota, for compensation or hire under Part 135 of the Federal Aviation Regulations.
12. The above described flight was conducted under IFR, in IMC conditions.
13. At the time of the above described flight, Excalibur Aviation, Inc. did not have approved Operations Specifications for IFR operations.

14. Mr. Lee Allen was pilot in command on the above cited flight.
15. At the time of this flight, Mr. Allen did not have a current IFR proficiency check.
16. Excalibur Aviation, Inc. operated the flight when the expiration date of the ELT batteries was past due and the batteries had not been replaced.

(96-GL-21-0009)

COUNT III.

17. On November 6 and November 9, 1995, Excalibur Aviation, Inc. operated civil aircraft N3141R, a Cessna 182, the property of another on passenger carrying flights, for compensation or hire under Part 135 of the Federal Aviation Regulations, from Bismarck, North Dakota, to Gwinner, North Dakota, and return.
18. Excalibur Aviation, operated civil aircraft N3141R, a Cessna 182, on the dates and locations as set forth below, in passenger carrying operations for compensation or hire under Part 135 of the Federal Aviation Regulations :

October 6, 1995	Bismarck, North Dakota to Devils Lake, North Dakota and return
November 3, 1995	Bismarck, North Dakota to Devils Lake, North Dakota and return
November 17, 1995	Bismarck, North Dakota to Devils Lake, North Dakota and return
December 1, 1995	Bismarck North Dakota to Devils Lake, North Dakota and return
December 5, 1995	Bismarck, North Dakota to Sioux Falls, South Dakota and return

January 5, 1996 Bismarck, North Dakota to
Devils Lake, North Dakota
and return

January 9, 1996 Bismarck, North Dakota to
Tama, Iowa

January 10, 1996 Tama, Iowa to
Bismarck, North Dakota

19. At the time of the above described flights, a Cessna 182 was not listed on Excalibur Aviation, Inc. Operating Specifications.
20. At the time of the above described flights, Excalibur Aviation, Inc. operated N3141R when the aircraft was not properly registered with the FAA.
21. On or about September 22, 1995, Excalibur Aviation, Inc. requested to add Cessna 182, N3141R, to its Operations Specifications and was denied because of discrepancies with the aircraft.
22. Mr. Tony Walth was pilot in command of the above described flights.
23. At the time of the above described operations, Mr. Walth was not listed as a pilot on Excalibur's Operations Specifications.
24. At the time of the above described flights, Mr. Walth had not passed the required tests and checks of Part 135.293(a) (b) and 135.299, within the past 12 months.

(96-GL-21-0016)

(96-GL-21-0019)

COUNT IV.

25. On January 16, 1996, Excalibur Aviation, Inc. operated N606CA, on a flight with four passengers on board, for compensation or hire under Part 135 of the Federal Aviation Regulations from Bismarck, North Dakota, to Watertown, South Dakota, and return.
26. Joseph B. Gerritson was pilot in command on the above described flights.

27. Mr. Gerritson was not listed as a pilot on Excalibur's Operations Specifications.
28. The return flight from Watertown, North Dakota, to Bismarck, North Dakota, was conducted under IFR.
29. The return flight was cleared for and landed a precision approach at Bismarck, North Dakota.
30. At the time of the above described flight, Excalibur did not hold approved Operations Specifications for IFR operations.
31. On or about August 29, 1995, Mr. Gerritson had failed to pass a competency/proficiency check for Excalibur Aviation.
32. At the time of the above described flight, Mr. Gerritson had not passed the required tests and checks of Part 135.293(a) (b), and 135.299 within the past 12 months and Part 135.297 within the past 6 months.
33. During the above described flight, Mr. Gerritson did not have the 1,200 hours of flight-time required to act as pilot in command under IFR under Part 135 of the Federal Aviation Regulations.

(96-GL-21-0014)

COUNT V

34. On January 3, 1996, Mr. Lee Allen failed a FAR 135.293 and FAR 135.299 Airman Competency/Proficiency Check for Excalibur Aviation, Inc.
35. On January 10, 1996, Excalibur Aviation, Inc. operated N221MJ, a Piper PA-31, on a flight with four passengers on board, for compensation or hire under Part 135 of the Federal Aviation Regulations, from Bismarck, North Dakota, to Eagle Butte, South Dakota, and return.
36. The portion of the above described flight from Bismarck, North Dakota, to Eagle Butte, South Dakota, was conducted under IFR.

37. At the time of the above described flight, Excalibur Aviation, Inc. did not hold approved Operations Specifications for IFR operations.
38. Mr. Lee Allen was pilot in command on the above cited flights.
39. At the time of these flights, Mr. Allen failed to have the required FAR 135 competency/proficiency checks under Part 135.293, 135.297 and 135.299.
40. Excalibur Aviation filed a flight plan with the Grand Forks Automated Flight Service Station listing an incorrect number of persons, two, in the aircraft.

(96-GL-21-0018)

COUNT VI

41. On January 3, 1996, Mr. Lee Allen failed a FAR Part 135.293 and FAR Part 135.299 Airman Competency/Proficiency Check for Excalibur Aviation, Inc.
42. On January 16, 1996, Excalibur Aviation, Inc. operated N221MJ, a Piper PA-31, on a flight with six passengers on board, for compensation or hire under Part 135 of the Federal Aviation Regulations, from Bismarck, North Dakota, to Wheatland, Wyoming, and return.
43. Mr. Lee Allen was pilot in command on the above cited flight.
44. At the time of these flights, Mr. Allen failed to have the required Part 135 competency/proficiency checks under Part 135.293 and 135.299.

(96-GL-21-0021)

45. The conduct of the above described flights was careless and endangered the lives or property of others.

Based on of the foregoing circumstances, Excalibur Aviation, Inc. violated the following Federal Aviation Regulations:

- a. Section 47.3(b) (1) and (2), which prohibits any person from operating an aircraft that is eligible for registration under Section 501 of the Federal Aviation Act of 1958 unless the aircraft has been registered

by its owner and is carrying aboard the required temporary authorization.

- b. Section 91.13(a), which prohibits the operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.
- c. Section 91.203(a) (2), which prohibits any person from operating a civil aircraft unless it has within it an effective U.S. registration certificate issued to its owner, for operations within the United States, the second duplicate copy (pink) of the Aircraft Registration Application or a registration certificate issued under the laws of a foreign country.
- d. ^(c)Section 91.2071 (2), which prohibits any person from operating a U.S. registered airplane unless there is attached to the airplane an approved automatic type emergency locator transmitter in which batteries have been replaced after 50 percent of their useful life has expired.
- e. Section 135.5, which prohibits any person from operating an aircraft under this part without or in violation of an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part.
- f. Section 135.63(c), which requires for multiengine aircraft each certificate holder is responsible for the preparation and accuracy of a load manifest concerning the loading of the aircraft.
- g. Section 135.95(b), which prohibits any certificate holder from using the services of any person as an airman unless the person performing those services is qualified, under this chapter, for the operation for which the person is to be used.
- h. Section 135.243(c) (2), which prohibits any certificate holder from using a person nor may any person serve as pilot in command of an aircraft under IFR unless that person has had at least 1,200 hours of flight time as a pilot, including 500 hours of cross country flight time, 100 hours of night flight time, and 75 hours of actual or simulated instrument time at least 50 hours of which were in actual flight.

- i. Section 135.293(a), which prohibits any certificate holder from using a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge.
- j. Section 135.293(b), which prohibits any certificate holder from using a pilot, nor may any person serve as a pilot in any aircraft unless since the beginning of the 12th calendar month before that service, the pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft.
- k. Section 135.297(a), which prohibits any certificate holder from using a pilot, nor may any pilot serve, as a pilot in command of an aircraft under IFR unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under the section administered by the Administrator or an authorized check pilot.
- l. Section 135.299(a), which prohibits any certificate holder from using a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly.

Further, it appears that you lack the degree of care, judgment, and responsibility required of the holder of such certificate.

By reason of the foregoing, the Administrator has determined that safety in air commerce, air transportation and the public interest require the revocation of your air carrier operating certificate number E4XA901W and operating specifications appropriate for operations under Part 135 of the Federal Aviation Regulations.

Furthermore, the Administrator has determined that safety in air commerce and the public interest require the immediate effectiveness of this Order.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator of the Federal Aviation Administration by Title 49

of the United States Code, Section 44709 (49 U.S.C. §44709), that:

1. Any Air Carrier Operating Certificate and operating specification appropriate for operations under Part 135 of the Federal Aviation Administration now held by you, including your Air Carrier Operating Certificate Number E4XA901W, is hereby revoked;
2. Such revocation shall be effective immediately;
3. You are directed to surrender such certificate by mail or delivery to the Assistant Chief Counsel for the Great Lakes Region of the Federal Aviation Administration,

Eileen Weikel Johnson
Assistant Chief Counsel

APPEAL

You may appeal from this Order within ten (10) days from the time of its service upon you. An original and four copies of your appeal must be filed within that time with the National Transportation Safety Board, Office of Administrative Law Judges, Room 5531, 490 L'Enfant Plaza, SW, Washington, DC 20594, [Phone (202) 382-0650]. A copy of your appeal must also be furnished to this office.

In view of the fact that your certificate was revoked on an emergency basis, the revocation of your certificate shall remain effective pending the outcome of any proceedings before the National Transportation Safety Board. Sections 821.54 through 821.57 of the Board's Rules of Practices in Air Safety proceedings, Title 49 Code of Federal Regulations Part 821, apply to such an appeal.

You are hereby advised that a copy of this Order will be forwarded to the National Transportation Safety Board in the event you appeal and will be considered the Administrator's Complaint on Appeal.

cc: Mr. Joseph D. Kuchta
Attorney at Law
Kuchta & Brinker
1919 Pennsylvania Ave., N.W., Suite 300
Washington D.C. 20006

cc: AFS-790/AGL-200/FSDO-21 D. Norton
AGL-7F:tjg:4/02/96:3